U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: **January 24, 2001**

Case No.: **2000-INA-141**
CO No.: **P1997-NY-02111082**

In the Matter of:

THEA HARLANS NAKASHIN
Employer,

on behalf of:

TERESA ZAKRZEWSKA
Alien.

Appearance: Andrew J. Olshevski, Esquire
for Employer and Alien

Certifying Officer: Dolores Dehaan
New York, New York

Before: Burke, Vittone and Wood
Administrative Law Judges

DECISION AND ORDER

Per Curiam. This case arises from an application for labor certification[1] filed by Thea Harlans Nakashin ("Employer") on behalf of Teresa Zakrzewska ("the Alien") for the position of Household Cook. The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties. § 656.27(c).

[1]Alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656. Unless otherwise stated, all references are to 20 C.F.R.

STATEMENT OF THE CASE

On January 22, 1997, Employer, Thea Harlan Nakashin, filed an application for alien employment certification on behalf of the Alien, Teresa Zakrzewska, to fill the position of Domestic Cook. The job to be performed was described as follows:

> Plan menus, purchase food, prepare, cook, bake meals, including Kosher cuisine, for household members, business/social guest as suitable for occasion & according to recipes and considering taste and dietary requirements. Clean kitchen. Wash dishes, kitchen utensils. Decorate platters & decorate table.

(AF 21-22). Total hours of employment were listed as 40 hours per week, from 8:00 a.m. to 4:00 p.m. Minimum requirements for the position were listed as two years experience in the job offered. Employer received no applicant referrals in response to its recruitment efforts. (AF 37).

A Notice of Findings ("NOF") was issued by the CO on June 18, 1999, citing § 656.20(c)(8) and questioning the existence of a *bona fide* job opportunity open to any U.S. worker. (AF 54-56). The CO noted that under immigration law, the number of immigrant visas available to "unskilled workers" is very limited, whereas, there is no current waiting period for most immigrant visas in the "skilled workers" category. Because the occupation of Domestic Cook requires two years of experience, it is considered a skilled position. Employer was instructed to explain why the position should be considered a *bona fide* opportunity for a Domestic Cook as opposed to one created solely for the purpose of qualifying the Alien as a skilled worker under current immigration law. Rebuttal evidence, at a minimum, was to include responses to twelve enumerated questions including documentation where appropriate. (AF 55).

In Rebuttal, Employer first cited to a Board case used to determine whether a job opening exists, and not merely the functional equivalent of self-employment, in order to show that a job opportunity actually exists in this case. Employer then addressed the questions presented in the NOF, stating that the Cook would prepare breakfast, lunch and dinner daily, with 60 minutes to prepare breakfast, 45 minutes to prepare lunch and 150 minutes to prepare dinner, for a total of 21 hours and 15 minutes each week. Employer stated that shopping would require an additional 7-1/2 to 10 hours, and dish-washing - 4 hours. Employer stated that meals were to be provided for her, her child and the cook on a daily basis with occasional dinner guests. (AF 59-65). Employer stated that she works from 9:00 a.m. to 6:00 p.m. and that her child attends school between the hours of 8-9 a.m. and 3-4 p.m. Employer indicated that there are no other domestic workers employed in the home and that the general household maintenance duties, such as cleaning, clothes washing, vacuuming, etc. are regularly performed by Employer herself. Employer stated that she entertains frequently including both social and family occasions, as well as business-related meetings, cocktail parties, and strict observance of

numerous Jewish religious holidays, but provided no documentation in support of this. Employer stated that she has not employed any full-time Domestic Cooks or other full-time domestic workers in the past, but has employed the Alien in the past on a part-time basis.

A Final Determination ("FD") denying labor certification was issued by the CO on August 31, 1999, based upon a finding that Employer had failed to adequately document that there is a *bona fide* position for a Domestic Cook in her household. (Af 71-72). The CO noted that the Board case cited by Employer in rebuttal was inapplicable, as the NOF never questioned whether a job opportunity exists, only which job opportunity actually exists. Citing the fact that Employer's work schedule and her daughter's school schedule do not coincide with the Domestic Cook's work schedule, the CO concluded that the Cook appeared only responsible for preparing the evening meal, grocery shopping and washing dishes on a daily basis. The CO observed:

> For example: the Domestic Cook arrives at 8:00 a.m. and prepares breakfast until 9:00 a.m. Employer works from 9:00 a.m. - 6:00 p.m. and her daughter starts school between the hours of 8:00 a.m. - 9:00 a.m. and does not return home until 3:00 p.m. - 4:00 p.m. Employer does not indicate that either she or her daughter take breakfast or lunch to-go. Based on this information, it does not appear that the Domestic Cook will be preparing breakfast or lunch for the employer and her daughter on a daily bases.

(AF 71).

Citing the fact that Employer had failed to submit any entertainment schedule, the CO observed that she could not determine the extent to which the Domestic Cook would be involved in preparing food for guests. Thus, the CO concluded that Employer has failed to prove that a *bona fide* Domestic Cook position exists within her household and labor certification was denied. *Id.* Employer filed a Request for Review on October 5, 1999. (AF 85-91).

DISCUSSION

Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker. This regulation means that the job opportunity must be *bona fide*, and that the job opening as described on Form ETA 750, actually exists and is open to U.S. workers. The burden of proof for obtaining labor certification is on the employer who seeks an alien's entry for permanent employment. § 656.2(b).

Employer was instructed in the NOF that "[r]ebuttal documentation must clearly substantiate that the position of Domestic Cook in your household is, in fact, a bona fide job opportunity and not a position that was created solely for the purpose of qualifying the alien as a skilled worker." Specifically, Employer was instructed to provide documentation and responses to 12 questions enumerated by the CO. In denying labor certification, the CO concluded that the details provided did not establish that

there was a *bona fide* position for Domestic Cook. We concur.

In *Carlos Uy III*, 1997-INA-304 (Mar. 3 1999) (*en banc*), the Board set forth a "totality of circumstances" test to be used in order to determine the *bona fides* of a job opportunity in domestic cook applications. As stated by the Board in *Uy*:

> The heart of the totality of the circumstances analysis is whether the factual circumstances establish the credibility of the position. In applying the totatlity of the circumstances test, the CO's focus should be on such factors as whether the employer has a motive to misdescribe the position; what reasons are present for believing or doubting the employer's veracity for the accuracy of the employer's assertions; and whether the employer's statements are supported by independent verification.

Id.

The burden of proving that the employer is offering a *bona fide* job opportunity is on the employer. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (*en banc*). As was noted by the Board in *Uy*, "[u]nder the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." *Id.* at 8. Further, it is well settled that a bare assertion without either supporting reasoning or documentation is generally insufficient to carry an employer's burden of proof. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*); *Uy*, at 9.

In the instant case, we find Employer's rebuttal documentation insufficient to establish that there is a *bona fide* position for a Domestic Cook in Employer's household. The position, as described by Employer, was to prepare three meals each day for her family of two, and meal preparation when she entertained. As was noted by the CO, Employer alleged that the Cook would be preparing three meals each day when there would be no one home to consume two out of the three. Employer has indicated that the Cook spends an hour each day in the preparation of breakfast; however, she does not start her workday until 8:00 a.m., when both the Employer and her daughter would have already left the house by the time breakfast would be prepared. Employer did not state that the meals would be prepared to-go the day before, that she or her daughter would come home for lunch, or any other explanation that would adequately explain the need for a full-time, experienced Cook. Nor did Employer detail or document her entertainment schedule in any way, despite the CO's specific request, so that the credibility of needing a cook for entertainment could be determined. We thus find Employer's documentation, as presented, lacking in credibility and insufficient to support the conclusion that a *bona fide* Domestic Cook position exists within her household. On this basis, we conclude that labor certification was properly denied. Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

_____

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.